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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 387

GRAFTON MAHONEY,

Appellant,

vs.

THE PAROLE BOARD OF THE STATE OF NEW JERSEY

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States as amended, Petitioner-Appellant submits herewith his statement, particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of New Jersey entered in this cause.

Opinion Below

The Opinion of the Supreme Court of New Jersey was filed on June 26, 1952 and appears in the advance reports of Atlantic Reporter, Second Series, for August 23, 1952. The decision is cited as 90 A. 2d 8. The majority, six Judges concurring, sustained the constitutionality of the statute in an Opinion by Justice Burling; a dissenting Opinion was

filed by Justice Heher. Copies of said opinions are attached hereto as Appendix A.

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on June 26, 1952. A Petition for Appeal, Citation, Order allowing Appeal, Assignments of Error and Statement as to Jurisdiction were presented to the Supreme Court of New Jersey prior to August 6, 1952, but Chief Justice Vanderbilt declined to allow the appeal, advising that it be presented to the United States Supreme Court Justice for the Circuit; said letters are appended hereto as Exhibit B.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U. S. Code, Section 1257, Statute of June 25, 1948, Chapter 646, 62 Stat. 929, and Title 28, U. S. Code, Section 2104, because there is drawn in question the validity of the New Jersey Parole Act of 1948 (Chapter 84, Laws of 1948) which Appellant contended was repugnant to the Fourteenth Amendment to the Constitution of the United States guaranteeing to all persons the equal protection and due process of the laws and the decision of the Court was in favor of its validity.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Lanzetta v. *State of New Jersey*, 306 U. S. 451; 59 Sup. Ct. 618;
Zucht v. *King*, 260 U. S. 174; 43 Sup. Ct. 24;
Yick Wo v. *Hopkins*, 118 U. S. 356; 6 Sup. Ct. 1064.

The federal question here presented was raised in the first instance by appeal to the Appellate Division of the Superior

Court of New Jersey to obtain a declaration as to the constitutionality of Paragraph c of Section 12 of the Parole Act whereunder the Parole Board of New Jersey denied Appellant consideration for release on parole. Prior to hearing and decision of the Appellate Division of the Superior Court, the Supreme Court of New Jersey on its own motion certified the cause to it for final determination of the constitutional issues raised by Appellant. The Supreme Court of New Jersey, by a decision of 6 to 1, sustained the constitutionality of the statute. The majority Opinion and dissenting Opinion are set forth as Appendix A.

Throughout the proceedings in the Appellate Courts of New Jersey, Appellant specifically charged that Paragraph c of Section 12 of said statute was repugnant to and violated the Fourteenth Amendment in that it denied the equal protection and due process of the laws guaranteed under said Amendment. These constitutional issues were preserved throughout as the majority and dissenting Opinions disclose.

Questions Presented

Where a statute enacted pursuant to a state constitutional mandate to create a parole system deals with parole rights of recidivists and thereunder confers parole consideration to fourth offenders who serve life sentences and to fourth offenders committed to County penitentiaries but denies such parole consideration to 4th offenders committed to the State prison, is it violative of the Fourteenth Amendment to the Constitution of the United States guaranteeing to all persons the equal protection of the laws?

May a State enact a parole law which is administered with an unequal hand so as to make illegal discriminations between persons in similar circumstances whereby those favored may be released under parole before the expiration of the maximum and those discriminated against denied

such consideration until they have served the maximum sentence?

Statutes Involved

Chapter 84, New Jersey Laws of 1948, known as the Parole Act. The sections of said Statute involved are 11, 12(c) and 35, which are set forth in Appendix C hereto.

Statement

Appellant was duly committed to the New Jersey State Prison on April 21, 1937 to serve 5 consecutive sentences, 4 of which were for a minimum of 3 years and a maximum of 5 years, and a fifth with a minimum of 2 years and a maximum of 3 years, on charges of breaking and entering and the possession of burglar tools. Appellant has served the maximum of the first 4 sentences and is now serving the maximum of the fifth.

The Parole Board of New Jersey in an ex parte proceeding, upon consideration of his prior prison record, adjudged him to be a fourth offender and as such, under Paragraph c of Section 12 of said statute, ineligible to receive parole consideration until he shall have served the maximum of the sentences imposed by the Court. Feeling aggrieved because under Section 11 fourth offenders serving life imprisonment and under Section 35 of said statute fourth offenders committed to the County penitentiaries were entitled to and did receive parole consideration prior to the expiration of their maximum sentences, Appellant, on January 2, 1952, formally requested the Parole Board of New Jersey to consider his case for parole purposes. On January 4, 1952 the Parole Board refused this request, stating that "it is precluded from considering him eligible for release on parole until he has served the maximum of the sentence or sentences imposed". (Appendix 3a, 4a.)

Pursuant to the Rules of the New Jersey Appellate

Courts, an appeal from the decision of this administrative tribunal was prosecuted first to the Appellate Division of the Superior Court and finally to the Supreme Court of New Jersey (the State Court of last resort). On June 26, 1952, the Supreme Court of New Jersey, by majority decision, held that the Parole Act as invoked against Appellant was constitutional and was not repugnant to the Fourteenth Amendment.

The Parole Statute on its face and in operation permits arbitrary and discriminatory parole consideration in relation to fourth offenders and Appellant's appeal from the decision of the Parole Board throughout the Appellate Courts of New Jersey was specifically predicated on the fact that the statute was violative of the Fourteenth Amendment in that it denied to all persons similarly situated the equal protection and the due process of the laws. The final decision of the New Jersey Supreme Court was to sustain the validity of the law holding that it did not contravene the guarantees under the Fourteenth Amendment.

The Questions Are Substantial

1. The issues here raised are of public importance. The rights here involved concern not only personal liberty with respect to parole rights but the welfare of society in general because it is a matter of great concern to society at large that criminal justice be administered with impartiality. The public welfare is vitally concerned in the rehabilitation of prisoners and the parole systems have been adopted to provide incentive to law violators for rehabilitation so that when they have completed their servitude they will be in a position to take their place in society as decent law-abiding citizens.

The State of New Jersey, by constitutional mandate, directed "a system for the granting of parole shall be pro-

vided by law". Under the guarantees of the Fourteenth Amendment as to the equal protection of the laws, it was necessary that such parole system as the Legislature enacted be fair, impartial and evenhanded and that the administration of the law and the exercise of the powers granted thereunder be free from unjust and illegal discriminations.

The statute here under attack is invalid on its face and as applied to Appellant as a fourth offender is arbitrary and discriminatory, thus deserving the condemnation of the Supreme Court of the United States in *McPherson* v. *Blacker* 146, U.S. 1, where the Court stated:

> "The inhibition that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating or hostile legislation."

Paragraph c of Section 12 of the Parole Act, which the Parole Board invoked against Appellant, provides, inter alia:

> "Any person sentenced to any penal institution of this State who has previously served all or part of three terms of imprisonment in any penal institution of the United States or any other State or States . . . shall be deemed to be a fourth offender and upon his incarceration for such fourth or later offense shall be ineligible for parole consideration by the Board until he shall have served the maximum. . . ."

Section 11 of said statute provides:

> "Any prisoner serving a sentence of life shall be eligible for consideration for release on parole after having served twenty-five years of his sentence less commutation time for good behavior and time credits earned. . . ."

Section 35 of said statute provides:

> "Notwithstanding any of the provisions of this Act, any prisoner in a County penitentiary serving a term having a maximum greater than a year and who has served at least one year of such term shall be permitted to make application to the Board for parole. . . ."

Under the foregoing statutory provisions, if Appellant, having already served prison sentences for three prior crimes, had been convicted of murder, for which he would have received a life sentence instead of the sentences he did receive for breaking and entering and possession of burglar tools, he would have received under Section 11 parole consideration upon the expiration of 25 years, less commutation and work credits which, as pointed out in the dissenting Opinion of Justice Heher, would have reduced his sentence to 14 years 7 months and 23 days.

This statute on its face and by operation did and does preclude fourth offenders in prison for crimes of less than murder but for terms which would exceed the normal span of life from receiving parole consideration, while a fourth offender who commits murder and receives the most severe punishment of life imprisonment would be entitled to receive parole consideration in less than 15 years.

Under the Habitual Criminal Law of New Jersey, a fourth offender, upon his conviction of the fourth or subsequent offense, shall be sentenced to life. (N.J. Revised Statutes 2:103-10 as amended) Thus, if Appellant, for the commission of the identical crimes for which he is now undergoing servitude, had been indicted, convicted and sentenced under the Habitual Criminal Law to life imprisonment, he would have been eligible for parole consideration. No reasonable and valid explanation can be offered to sustain such a law which, dealing with the same

class, to wit, fourth offenders, grants the more culpable offender parole rights but deprives others, less culpable in the eyes of the law, of parole rights.

Under Section 35, had Appellant for his fourth or subsequent offense been sentenced to a County penitentiary for a term of not less than a year nor more than eighteen months, he would have received parole consideration after serviture of one year. The State, to justify the grant of parole consideration under Section 35, argues that the County penitentiaries receive offenders who have committed the less serious crimes. Such is not the case. Chapter 153, Laws of 1945, N.J. Stat. Ann., Title 2:192-3, provides for the places of incarceration *and the type of crime is not a relevant factor.* The statute provides, *inter alia*:—

> "Every person sentenced to hard labor or imprisonment . . . for any term of one year or longer shall be imprisoned in the State prison; except that in any County in which a penitentiary is located a person sentenced to hard labor and imprisonment for a term of not less than one year and not exceeding 18 months shall be imprisoned in a penitentiary of such County instead of the State Prison. . . . In any County in which a work house is located any person sentenced to hard labor and imprisonment for a term of not less than one year and not exceeding 18 months may, in the discretion of the Court so sentencing, be imprisoned in such County work house instead of the State Prison or County penitentiary."

It is self-evident that under the New Jersey law it is the term of imprisonment *and not the type of crime* which determines the place of confinement. Had Appellant herein, for the identical offense, received a term of not less than a year nor more than 18 months, he could have been committed under this statute to a County penitentiary, in which case

he would have received parole consideration despite his status as a fourth offender. Surely the geographical circumstance of the location of a County penitentiary cannot afford a basis for classification in legislating as to the parole rights of recidivists.

Paragraph c of Section 12 which was invoked against Appellant makes no attempt to grade the crimes so as to ascertain whether they were felonies or misdemeanors or whether they involved *crimens falsi* or moral turpitude. The statutory requirement is met if a person served prison sentences, whole or in part, in a prison of the United States or a State Prison of the State of New Jersey or of any other State. Indeed, there is not even a statutory requirement that the prior crime or crimes against the United States or the other States for which prison terms were served are crimes under the law of New Jersey.

No reasonable or legal basis for classification exists whereunder fourth offenders serving life or serving sentences in County penitentiaries are favored by parole consideration and fourth offenders committed to State Prisons are denied such rights. It is axiomatic under settled constitutional law that classification must be reasonable and bear a relationship to the policy of the law. Here the Legislature of New Jersey adopted a system of parole supervision to promote rehabilitation incentive for recidivists. Under Section 12 a second offender is eligible after servitude of one-half of the maximum; a third offender at the expiration of three-fourths of the maximum, and under Paragraph c, a fourth offender is ineligible for parole until he serves the maximum. Here the Legislature was dealing with second, third and fourth offenders.

Under these circumstances, no valid or legal explanation can be offered to justify Section 11 which permits a fourth

offender serving a life sentence to receive parole consideration in a far shorter period of time which conceivably could be had by a fourth offender under Paragraph c of Section 12 who committed less heinous crimes. To the same extent, Paragraph c of Section 12, in comparison with Section 35, is unconstitutional under the Fourteenth Amendment. A fourth offender who was committed to a County penitentiary is no different than a fourth offender who is committed to a State Prison, yet by the express terms of the statute and under the enforcement of the Act by the Parole Board, the fourth offender committed to the County penitentiary is favored with parole rights and the fourth offender in the State Prison is discriminated against.

Concluding discussion of the facts, the attention of this Court is respectfully directed to the widespread prison disorders in the State of New Jersey, as well as other States in the Union. These disorders were given widespread publicity and investigations are presently being conducted and remedial measures considered, and one of the prime causes attributed to these disorders was inadequate or discriminatory parole systems.

It is, therefore, in the public interest that this Court take jurisdiction of this case and determine these questions on the merits as to whether administrative tribunals such as the Parole Board of New Jersey can arbitrarily and without legal and constitutional restraint confer to persons similarly situated rights and benefits and deny such rights and benefits to those it wishes to exclude.

2. The opinion of Justice Burling, speaking for the majority, failed to recognize and apply the settled constitutional legal principles established by the many decisions of the Supreme Court of the United States.

In determining constitutional issues, the decisive test as to whether a statute is constitutionally valid *is determined*

not by what is done but what may reasonably be done under the statute.

Lindsley v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369;

McLean v. *Arkansas*, 211 U.S. 539, 29 S. Ct. 206.

Justice Burling, in discussing and disposing of the inequality as to the rights of fourth offenders under Sections 11 and 35 as compared to Section 12, stated (Appendix A):

> "With these observations in mind we came to consideration of Mahoney's contention that section 12 of L. 1948 is not applicable to recidivists serving a life sentence, who, he contends, are eligible for parole consideration under section 11. . . . However, since the specific conflict between Section 11 and section 12 is not involved in this appeal (Mahoney's last sentence was not one of life imprisonment) it is deemed unnecessary to resolve the same at this time."

In dealing with the conflict between Section 35 and Section 12, the Court stated:

> "With respect to section 35, supra, there is no merit in Mahoney's assertion of discrimination. Section 35 limits the grant of paroles to applications where 'the circumstances of the case warrant' and 'in the manner provided for herein.' These provisions invoke section 12 and preclude parole under section 35 except as limited in section 12. Further, the obvious purpose of section 35 is solely to permit prisoners in a county penitentiary to *apply* for parole, a privilege denied to prisoners in the State Prison and other correctional institutions by section 17 of the same act."

To the contrary, Section 35 expressly and unequivocally is free and independent of Section 12 insofar as if parole rights are concerned because the very first sentence of the section states, "*Notwithstanding any of the provisions of*

this act, any prisoner in a county penitentiary . . . shall be permitted to make application to the Board for parole." (Italics supplied.)

It was an imperative duty of the majority Court to decide the issues raised under Section 11 squarely and not to bypass it by the mere observation that since Appellant was not serving a life sentence, "it is deemed unnecessary to resolve the same at this time." Under the decisions hereinabove cited, the Court was bound to apply the constitutional test as to what reasonably could be done under the statute.

The reasoning and decision of the majority is otherwise erroneous because the majority Opinion recognized a discriminatory effect upon fourth offenders under Section 12 and fourth offenders under Section 35 when it stated, "Further, the obvious purpose of section 35 is solely to permit prisoners in a county penitentiary to *apply* for parole, *a privilege denied to prisoners in the State Prison and other correctional institutions. . . .*" (p. 8). (Italics supplied.)

Thus, the majority decision recognizes a discrimination between fourth offenders under Sections 12 and 35 with respect to the right to "apply" for parole. This was the contention we sought to establish. Under the settled and fundamental law—established by innumerable decisions of this Court—it was the duty of the New Jersey Supreme Court to have upheld Appellant on his constitutional challenge.

In *Louisville and Nashville R. R.* v. *Stock Yards Co.*, 212 U. S. 133, 144, 29 S. Ct. R. 246, the Court said:

> "The law itself must save the parties' rights and not leave them to the discretion of the Courts as such."

The personal guarantees as to the equal protection of the laws under the Fourteenth Amendment are inalienable and under the Amendment Appellant as a fourth offender, whether he were undergoing a life sentence or was com-

mitted to a County penitentiary, was entitled to the equality of treatment of other fourth offenders, especially those favored by Sections 11 and 35.

The dissenting Opinion of Justice Heher, on the other hand, squarely meets and answers the constitutional questions here presented. Having found that a discrimination exists and that the Legislative distinction and artificial classifications were illusory, he rightly ruled, following the many decisions of this Court, that such arbitrary action was repugnant to the basic constitutional safeguards embodied in the Fourteenth Amendment.

He stated:

> "The Constitution contemplates a fair and reasonable exercise of the power in the service of the general parole policy. The Legislature necessarily has a great latitude of discretion in classifying prisoners for parole consideration. But the power is not absolute; its exercise is contained by the dictates of fairness and reasonableness and the equality of right and privilege—the antithesis of arbitrary action—that is basic in our constitutional system." Compare *Finley* v. *California*, 222 U. S. 28, 32 S. Ct. 13, 56 L. Ed. 75 (1911); *Carlesi* v. *New York*, 223 U. S. 51, 34 S. Ct. 576, 58 L. Ed. 843 (1914).

The judgment of the Supreme Court of New Jersey is in opposition to the decisions of this Court bearing on the guarantee of the equal protection of the laws under the Fourteenth Amendment and in view of the conflict of decision as reflected in the majority and minority Opinions, especially since the questions presented by this appeal are substantial and of public importance, this Court should review the cause and decide the issues on the merits.

Respectfully submitted,

SAMUEL KAGLE,
IVAN C. BASH,
Counsel for Petitioner-Appellant.

APPENDIX "A"

SUPREME COURT OF NEW JERSEY, SEPTEMBER TERM, 1951

No. A110

GRAFTON MAHONEY, *Appellant*,

vs.

THE PAROLE BOARD OF THE STATE OF NEW JERSEY, *Respondent*

MAJORITY OPINION OF JUSTICE BURLING

Argued March 24, 1952. Decided June 26, 1952.

On appeal from the Parole Board of the State of New Jersey.

Mr. Samuel Kagle, of the Pennsylvania Bar, argued the cause for the appellant (Mr. Ivan C. Bash, attorney).

Mr. Eugene T. Urbaniak, Deputy Attorney General, argued the cause for the respondent. (Mr. Theodore D. Parsons, Attorney General of New Jersey, Attorney).

The opinion of the court was delivered by

BURLING, *J.*:

This is an appeal to the Superior Court, Appellate Division, under *Rule* 3:81-8 (in lieu of the prerogative of writ of *certiorari*) from an order of the Parole Board of the State of New Jersey. The proceeding was brought to obtain a declaration of the constitutionality and effect of paragraph c of section 12 of L. 1948, c. 84 (the Parole Act; N. J. S. A. 30:4-123.1 *et seq.*) and the validity of a ruling of the Parole Board of the State of New Jersey (hereinafter called the Parole Board) contained in a letter from the Chairman of the Parole Board dated January 4, 1952, denying the appellant, Grafton Mahoney (hereinafter called Mahoney) consideration for release on parole. Although this proceeding was described in the pleadings and briefs as a petition for declaratory judgment under Rule 3:31-10, adjectively

speaking this appears improper inasmuch as no review is sought of an administrative rule promulgated by a state administrative agency. Prior to hearing before the Appellate Division this action was brought to this court pursuant to certification allowed on our own motion.

In the study of this case we must first notice that the Constitution of 1844 contained the following provisions:

> "The governor, or person administering the government, the chancellor, and the six judges of the court of errors and appeals, or a major part of them, of whom the governor, or person administering the government, shall be one, may remit fines and forfeitures, and grant pardons, after conviction, in all cases except impeachment. N. J. Const. 1844, Art. 5, par. 10.

Whereas under the Constitution of 1947, the general subject is dealt with as follows:

> "1. The Governor may grant pardons and reprieves in all cases other than impeachment and treason, and may suspend and remit fines and forfeitures. A commission or other body may be established by law to aid and advise the Governor in the exercise of executive clemency.
>
> 2. A system for the granting of parole shall be provided by law." N. J. Const. 1947, Art. 5, sec. 2, pars. 1 and 2."

Pursuant to that authority the legislature enacted an act in 1948 which took effect May 28, 1948. This established a parole system as distinct from the pardoning power.

It must be observed that the parole act gives the power to and imposes the duty upon the Parole Board to classify the offenders upon entry into confinement so as to formulate a time table for consideration for parole of each inmate. No provision is made for hearing upon the classification in fact it is expressly provided to the contrary. L. 1948, c. 84, sec. 17; N. J. S. A. 30:4-123.17. The wisdom of such a policy is for the legislature and is not a constitutional requirement.

The agreed statement of facts, filed pursuant to Rules 1:2-22 (applicable to the Appellate Division under *Rule*

4:2-6) and 3:81-10 shows: that Mahoney was committed to the New Jersey State Prison at Trenton on April 21, 1937 from the appropriate criminal court in Essex County; that on that same date he was given 5 consecutive sentences, 4 of which had a minimum of 3 years and a maximum of 5 years on conviction of charges of breaking and entering, and the 5th having a minimum of 2 years and a maximum of 3 years on conviction of the charge of possession of burglar tools; that interrogation of Mahoney by prison authorities, and examination of his fingerprint record submitted to them by the Federal Bureau of Investigation of the United States Department of Justice in Washington, D. C., disclosed that he had the following previous criminal record of convictions and sentences:

> As Grafton Mahoney No. A-11391, appellant was convicted of the crime of escape and sentenced to the State Prison in Pittsburgh, Pennsylvania, on May 11, 1921, for a term of 10 years.
>
> As Earl Comer No. 11050, appellant was convicted of the crime of breaking and entering and sentenced on November 4, 1927 for a term of 4 years to the New Jersey Prison at Trenton.
>
> As Grafton Mahoney No. 62797 appellant was convicted of the crime of burglary in a dwelling by night on November 6, 1930 and given a sentence of from 5 to 30 years in the State Prison at Columbus, Ohio.

Mahoney admits that he is the individual so convicted on the dates above specified and was sentenced to and confined in the respective State Prisons at Pittsburgh, Pennsylvania; Trenton, New Jersey; and Columbus, Ohio, all being prior to the sentences now being served by him at State Prison in Trenton. The statement of facts also shows that he was not indicted, tried, convicted or sentenced as an habitual offender at the time of his sentencing in Essex County on April 21, 1937. See *State* v. *Burns*, 136 N.J.L. 601, 603 (E & A 1948).

The Parole Board, upon a consideration of the foregoing prior convictions of the appellant and the fact of his confinement in the aforementioned State Prisons of

Pennsylvania, New Jersey and Ohio, admitted by appellant but not formally proved at a hearing before respondent, determined that he was a fourth offender within contemplation of section 12, Chapter 84, L. 1948 (N.J.S.A. 30:4-123.12) and further determined that respondent was precluded from considering appellant eligible for release on parole prior to the expiration of the maximum of the sentence imposed upon him.

On January 2, 1952, Mahoney addressed a letter to the Parole Board requesting consideration of his case. The Parole Board, by letter of January 4, 1952, addressed to the Principal Keeper of the State Prison, replied as follows:

> "The information in the possession of the State Parole Board indicates that Grafton Mahoney is a fourth offender in contemplation of said Section 12, Chapter 84, P.L. 1948, and it is the judgment of this board that it is precluded from considering him as eligible for release on parole until he has served the maximum of the sentence or sentences imposed upon him less credits for work performed.
>
> "It is further our understanding that Grafton Mahoney does not deny that he was the individual convicted on the prior occasions but rather takes the position that his admission thereof is insufficient to permit this board to classify him as such fourth offender under Section 12 aforesaid.
>
> "Please inform Grafton Mahoney of this decision of the Parole Board."

Shortly thereafter, Mahoney instituted the present proceeding in the Superior Court, Appellate Division. Prior to hearing there, certification was allowed on this court's own motion, as hereinbefore stated.

The questions involved, asserted by Mahoney, are whether he has been denied equal protection of the laws and due process of the law, under the 14th amendment to the United States Constitution, by L. 1949, c. 84 (N.J.S.A. 30:4-123.1 *et seq.*). These necessarily involve construction of various portions of that enactment including para-

graph c of section 12, under which the action of the Parole Board was effectuated.

Mahoney's first objection is that he is, by the terms of the statute, deprived of equal protection of the laws under the 14th amendment to the Constitution of the United States. The gist of Mahoney's contention in this respect is that sec. 12, par. c, of L. 1948, c. 84 (N.J.S.A. 30:4-123.12, c) is not uniformly applicable to 4th offenders, in that some 4th offenders are eligible for parole at an earlier period during their confinement than is Mahoney. To support his contentions he argues that 4th offenders sentenced to life imprisonment under the habitual criminals act (R.S. 2:103-10 as amended by L. 1940, c. 219, sec. 3; see also N.J.S. 2A:85-12) are eligible for parole under section 11 of the parole act (N.J.S.A. 30:4-123.11) after serving 25 years (less good conduct and work credits), and those confined in county penitentiaries serving terms greater than 1 year are eligible for parole after serving at least 1 year of such term. The State agrees with Mahoney that the limitations contained in section 12 have no reference to section 11, and argues that those serving life sentences are in a different class because they have no determinable maximum sentence and if released remain in parole for life whereas those released under section 12 are freed of parole at the expiration of the time of their maximum sentences. As for section 35 of the same statute (N.J.S.A. 30:4-123.35) the State contends that prisoners in a county penitentiary constitute a different class from those confined in a state prison for the reason that their crimes are less serious, and that in any event there is no provision in section 35 releasing county prisoners from the restrictions of section 12. In resolving these conflicting arguments and reaching the construction of the enactment the court is required to read the terms used by the legislature, so as to reach an understanding of the legislative intent and define the same in such a way as to give effect to every word and phrase of the statute. *Hoffman* v. *Hock*, 8 N.J. 397, 406, 409 (1952); *Lynch* v. *Borough of Edgewater*, 8 N.J. 279, 286 (1951). To do this, it seems necessary to set forth in full the language of the pertinent

portions of L. 1948, c. 84 (N.J.S.A. 30:4-123.1 *et seq.*) to which our attention has been drawn. They are as follows:

Sec. 11 (N.J.S.A. 30:4-123.11):

"Any prisoner serving a sentence of life shall be eligible for consideration for release on parole after having served twenty-five years of his sentence, less commutation time for good behavior and time credits earned and allowed by reason of diligent application to work assignments."

Sec. 12 (Par. c.) (N.J.S.A. 30:4-123.12, par. (c)):

"The granting of parole, as provided for herein, shall be limited as follows:

* * * * * * *

(c) Any person sentenced to any penal institution of this State who has previously served all or part of three terms of imprisonment in any penal institution

(1) of this State, of the United States, or of any State other than this State, or

(2) Of this State and the United States, or of this State, the United States and any other State or States, or

(3) Of the United States and any other State or States, or of more than one State other than this State,

"Shall be deemed to be a fourth offender and upon his incarceration for such fourth or later offense shall be ineligible for parole consideration by the board until he shall have served the maximum sentence imposed upon him for such fourth or later offense less any time earned for diligent performance of work assignments; subject, however, to the provisions of section 13 of this act. (Note—Section 13 was repealed by L. 1950, c. 315, sec. 3).

"As used in this section 'penal institution' means and includes the New Jersey State Prison and any

other State penal or correction institution in this State to which offenders are sentenced for fixed terms or fixed minimum and maximum terms and other institutions of like character under the jurisdiction of the United States or a State or States other than this state."

Section 35 (N.J.S.A. 30:4-123.35):

"Notwithstanding any of the provisions of this act, any prisoner in a county penitentiary serving a term having a maximum greater than a year and who has served at least one year of such term shall be permitted to make application to the board for parole. The application shall be on forms to be prescribed and furnished by the board through the warden or chief executive officer of such county penitentiary upon certification that the prisoner desiring to make application is eligible therefor. The board upon receipt of such application may, if the circumstances of the case warrant, grant a parole to any such prisoner in the manner provided for herein, subject to such terms, conditions and limitations as this board may prescribe, and such prisoner while on parole shall be under the supervision of the probation officer of the county from which committed until the maximum term of his sentence has expired."

It is also important to note the following portion of section 17 (N.J.S.A. 30:4-123.17):

"*The release of a prisoner on parole shall be solely upon the initiative of the board and no application for parole made by a prisoner, or on his behalf, shall be considered by the board.* The warden, keeper or chief executive officer of any penal or correctional institution referred to in this act shall permit all prisoners to forward uncensored mail to the board. It shall be the duty of the board to maintain a record of the dates upon which each prisoner shall first be eligible for parole consideration as provided in section nine hereof. On or before such date, in the case of each prisoner, it shall further be the duty of the board to consider the case of each such prisoner for parole and to cause to be brought

before it all information regarding the prisoners referred to herein . . ." (emphasis supplied).

Recidivists are treated differently in various jurisdictions in this country and abroad. Three theories have been suggested by text writers and authorities elsewhere as the foundation concepts for these variant practices, namely (a) punishment imposed for a subsequent offense on the consideration of the persistence of the defendant in his criminal course, (b) warning and deterrent to first offenders and (c) preventive detention or security for the public against the propensities of criminals with repetitive tendencies. See 25 Am. Jur., Habitual Criminals, sec. 1, p. 260 and sec. 3, p. 261; "The Habitual Criminal", Norval Morris (1951). Punishment and deterrents, whether imposed as civil penalties or as sentences following criminal convictions, are designed to the end that offenders will learn that it does not pay to invade the rights of others. With the habitual criminal the police power is exerted primarily to protect the persons and property of citizens of the state because the prisoner's conduct has already demonstrated his inability to learn to accept social and civil responsibility. It is within the power of the state to deprive him of parole. *Ughbanks* v. *Armstrong*, 208 U.S. 481, 52 L. Ed. 582 (1908). Followed in *Connors* v. *Illinois*, 260 U.S. 695, 67 L. Ed. 468 (1922); *Redwine* v. *Texas*, 261 U.S. 608, 67 L. Ed. 825 (1923). Compare *White* v. *Parole Board of State of N. J.*, 17 N.J. Super. 580, 586 (App. Div. 1952).

With these observations in mind we come to consideration of Mahoney's contention that section 12 of L. 1948, c. 84 (N.J.S.A. 30:4-123.12) *supra*, is not applicable to recidivists serving a life sentence, who, he contends, are eligible for parole consideration under section 11 of L. 1948, c. 84 (N.J.S.A. 30:4-123.11) *supra*. However, since the specific conflict between section 11 and section 12 is not involved in this appeal (Mahoney's last sentence was not one of life imprisonment) it is deemed unnecessary to resolve the same at this time.

The real issue on this phase of the case is, as raised by Mahoney, whether (on the assumption that section 12

is inapplicable to one serving a life sentence and therefore eligible for parole under section 11) he, as a fourth offender *not* sentenced to life imprisonment, is unreasonably discriminated against by the terms of Section 12 of the parole act. Mahoney's theory is that under section 11 any life prisoner (including a 4th offender serving a life sentence) is eligible for parole after serving 15 years of his life sentence (the net period of confinement if all legal commutation credits were earned and section 11 applies), whereas, he, Mahoney, must serve a minimum of 23 years (his total maximum time, 31 years, less commutation credits earned) before becoming eligible for consideration for parole. The state argues that the difference in classification is reasonable because a person sentenced to life imprisonment remains subject to parole conditions after his release for the remainder of his life, and at any time may be incarcerated for violation of parole, whereas one not sentenced to life imprisonment will remain subject to parole conditions (and the risk of reincarceration for violation of parole) after his release only for that period of time which constitutes the balance of the maximum of the sentence or sentences imposed upon him. This is a reasonable basis for the difference of classification asserted as presented on this appeal, and it is unnecessary for us to decide whether section 12 applies to a recidivist whose last sentence was to confinement for life.

With respect to section 35, *supra*, there is no merit in Mahoney's assertion of discrimination. The entire statute must be read to reach a proper construction of this section. Section 35 limits the grant of paroles to applications where "the circumstances of the case warrant" and "in the manner provided for herein." These provisions invoke section 12 and preclude parole under section 35 except as limited in section 12. Further, the obvious purpose of section 35 is solely to permit prisoners in a county penitentiary to *apply* for parole, a privilege denied to prisoners in the State Prison and other correctional institutions by section 17 of the same act (quote *ante*).

Mahoney's second question involved is that he was denied

due process of the law by reason of the Parole Board's refusal to accord him a hearing upon the question of his prior convictions. The Parole Board's refusal to accord him such a hearing was effected pursuant to the statutory direction contained in section 17 of c. 84 L. 1948 (N. J. S. A. 30:4-123.17) *supra*, namely that release on parole shall be solely on the initiative of the Parole Board and "no application . . . by a prisoner . . . shall be considered" (except under section 35 of the same act, *supra*). Paroles are favors granted by the State to convict criminals and it may attach such conditions to the application for or the granting of the favor as it may deem proper, or may deny the favor completely. The procedure to ascertain the fact as well as the kind of evidence upon which to base its determination on advisability of parole is a matter of state policy exclusively for the State to decide. "It is not bound to give the convict a hearing upon the question of prior conviction, and a failure to give it violates no provision of the Federal Constitution." *Ughbanks* v. *Armstrong, supra; White* v. *Parole Board of State of New Jersey, supra.*

For the reasons stated, we do find and declare that L. 1948, c. 84, sec. 12, par. (c) (N. J. S. A. 30:123.12(c)), does not violate the 14th amendment to the Federal Constitution and that the action of the Parole Board of the State of New Jersey in classifying Grafton Mahoney as a 4th offender and ineligible for parole at the time of his application therefor was proper and should be and is hereby affirmed. Mahoney's prayer for relief in the nature of a direction to the Parole Board of the State of New Jersey to require the latter to give him a hearing on parole eligibility is denied. Costs shall not be taxed against the appellant.

SUPREME COURT OF NEW JERSEY, No. A-110, September Term, 1951.

GRAFTON MAHONEY, *Appellant*,

v.

THE PAROLE BOARD OF THE STATE OF NEW JERSEY, *Respondent.*

DISSENTING OPINION OF JUSTICE HEHER

HEHER, *J.*, Dissenting:

The State Constitution of 1947 empowers the Governors to grant pardons and reprieves in all cases other than impeachment and treason, and to suspend and remit fines and forfeitures, and to establish a commission or other body to aid and advise the Governor in the exercise of executive clemency, and directs that "A system for the granting of parole shall be provided by law," *Article* V, *Section* II, *paragraphs* 1 and 2.

It is of the essence of this constitutional direction for the establishment of a parole system that the exercise of the power be free from unjust and invidious discriminations. The principle of the equal protection of the laws is implicit in the provision. There can be no arbitrary classification of prisoners for parole eligibility. The Constitution contemplates a fair and reasonable exercise of the power in the service of the general parole policy. The Legislature necessarily has a great latitude of discretion in classifying prisoners for parole consideration. But the power is not absolute; its exercise is contained by the dictates of fairness and reasonableness and the equality of right and privilege —the antithesis of arbitrary action—that is basic in our constitutional system. Compare *Finley* v. *California*, 222 *U.S.* 28, 32 *S. Ct.* 13, 56 *L. Ed.* 75 (1911); *Carlesi v. New York*, 223 *U.S.* 51, 34 *S. Ct.* 576, 58 *L. Ed.* 843 (1914).

Here, the statute makes an arbitrary distinction between fourth offenders who are life prisoners and those who are not that bears no reasonable relation to the policy of the law. The fourth offender undergoing a sentence of life

imprisonment, whether for murder in the first degree or as an habitual criminal under R.S. 2:103-10, as amended (see, also, *N.J.S.* 2A:85-12) becomes eligible for parole consideration when he has served 25 years of his sentence less commutation time for good behavor and work credits making possible a reduction of the minimum period to 14 years, 7 months and 23 days, while a fourth offender not under a life sentence is obliged to serve his full maximum sentence, even although it far exceeds the minimum period which qualifies the fourth offender under a life sentence for parole consideration. In the case now before us the maximum sentence less earned commutation time is 23 years; in some cases the fourth offender's maximum sentence goes beyond the normal life span.

It has been said that release on parole is a matter of grace. It is rather a discretionary function controlled by well-defined considerations concerned with the welfare of society and the interest of the prisoner which need not be elaborated here. Certainly, eligibility for parole consideration is not to be arbitrarily granted in one case and refused in another in like circumstances. Unequal operation of the law would run counter to the genius and spirit of the Constitution. The Constitution is not to be read as conferring absolute power—a wholly unregulated discretion that would admit of partiality and inequality in the extension of paroles. The statement of the affirmative of this proposition carries its own refutation. The use of the term "system" in the grant of power bespeaks its essential quality and limitations. The principle finds expression in the *Fourteenth Amendment* to the *Federal Constitution.* It is expounded in *Smith v. Board of Examiners,* 85 *N.J.L.* 46.

It is not an answer to say that the released life prisoner is subject to parole supervision so long as life lasts, unless clemency be extended, while a fourth offender discharged from imprisonment upon completion of his maximum sentence is not. This I consider an artificial and illusory distinction that does not take into account the policy and purpose of the parole law, *i.e.* release from imprisonment before the maximum sentence is served. Parole is in mitigation

of the punishment, so much so that retroactive laws granting more favorable parole terms to the prisoner are not *ex post facto*. *Lindsy v. Washington*, 301 *U.S.* 397, 57 *S. Ct.* 797, 81 *L. Ed.* 1182 (1937); *People v. Adams*, 274 *N.Y.* 447, 9 *N.E.* (2*d.*) 46 (*Ct. of App. N.Y.* 1937); *Andrus v. McCauley*, 21 *Fed. Supp.* 70 (*D.C. Wash.* 1926).

I would reverse the judgment.

APPENDIX "B"

SUPREME COURT OF NEW JERSEY

Arthur T. Vanderbilt, Chief Justice

August 5, 1952.

Mahoney v. The Parole Board

DEAR MR. KAGLE:

Your letter of July 30th has been received in the absence of Chief Justice Vanderbilt who is in Maine on vacation. He will not return until early in September.

The practice in New Jersey has been for the Chief Justice to decline to allow an appeal, thus making it possible for the applicant to go directly to the Circuit Justice of the United States Supreme Court.

Very truly yours,

(S.) AGNES WAHLGREN,
Secretary to Chief Justice Vanderbilt.

Samuel Kagle, Esquire, 1700 Bankers Securities Building, Philadelphia 7, Pa.

SUPREME COURT OF NEW JERSEY

STATE HOUSE ANNEX

TRENTON, N. J.

August 20, 1952.

Ivan C. Bash, Esq.,
Broad Street Bank Bldg.,
Trenton, N. J.

Re: Grafton Mahoney vs. Parole Board of New Jersey

DEAR SIR:

I am directed by the Chief Justice to advise you that it is not the practice to allow appeals to the United States Supreme Court but to permit counsel rather to apply to the United States Supreme Court Justice for the Circuit.

Very truly yours,

L. E. WARWICK, *for*
John H. Gildea, Deputy Clerk.

APPENDIX "C"

Sections 11, 12 and 35 of the Parole Act of 1948

Sec. 11 (N.J.S.A. 30:4-123.11):

"Any prisoner serving a sentence of life shall be eligible for consideration for release on parole after having served twenty-five years of his sentence, less commutation time for good behavior and time credits earned and allowed by reason of diligent application to work assignments."

Sec. 12 (par. c) (N.J.S.A. 30:4-123.12, par. (c)):

"The granting of parole, as provided for herein, shall be limited as follows:

* * *

(c) Any person sentenced to any penal institution of this State who has previously served all or part of three terms of imprisonment in any penal institution

(1) of this State, of the United States, or of any State other than this State, or

(2) of this State and the United States, or of this State, the United States and any other State or States, or

(3) of the United States and any other State or States, or of more than one State other than this State,

"Shall be deemed to be a fourth offender and upon his incarceration for such fourth or later offense shall be ineligible for parole consideration by the board until he shall have served the maximum sentence imposed upon him for such fourth or later offense less any time earned for diligent performance of work assignments; subject, however, to the provisions of section thirteen of this act. (Note—Section 13 was repealed by L. 1950, c. 315, sec. 3).

"As used in this section 'penal institution' means and includes the New Jersey State Prison and any other State penal or correction institution in this State to which offenders are sentenced for fixed terms or fixed minimum and maximum terms and other institutions of like character under the jurisdiction of the United States or of a State or States other than this State."

Section 35 (N.J.S.A. 30:4-123.35):

"Notwithstanding any of the provisions of this act, any prisoner in a county penitentiary serving a term having a maximum greater than a year and who has served at least one year of such term shall be permitted

to make application to the board for parole. The application shall be on forms to be prescribed and furnished by the board through the warden or chief executive officer of such county penitentiary upon certification that the prisoner desiring to make application is eligible therefor. The board upon receipt of such application may, if the circumstances of the case warrant, grant a parole to any such prisoner in the manner provided for herein, subject to such terms, conditions and limitations as the board may prescribe, and such prisoner while on parole shall be under the supervision of the probation officer of the county from which committed until the maximum term of his sentence has expired."

(4402)

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OCT 10 1952

HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 387

GRAFTON MAHONEY,

Appellant,

vs.

THE PAROLE BOARD OF THE STATE OF NEW JERSEY

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

THEODORE D. PARSONS,
Attorney General of New Jersey;
EUGENE T. URBANIAK,
Deputy Attorney General,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 387

GRAFTON MAHONEY,

Appellant,

vs.

THE PAROLE BOARD OF THE STATE OF NEW JERSEY

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The appellee in the above entitled cause for its statement in opposition to appellant's statement as to jurisdiction herein, and in support of appellee's motion to dismiss or affirm, respectfully shows the following:

I. Statement of Issues on Appeal

The question sought to be presented in this appeal is appellant's claim that the Parole Law of the State of New Jersey, Chapter 84, P.L. 1948, is repugnant to the 14th Amendment of the Constitution of the United States in that, within certain sections thereof, the law denies to all persons

or classes of persons the equal protection and due process of the law.

Appellant attacked the constitutionality of the statute involved in the courts of New Jersey and our Supreme Court determined that no repugnancy existed with respect to the 14th Amendment of the United States Constitution. The opinion of the said court appears in Appendix A of appellant's statement as to jurisdiction.

Appellant was convicted in the courts of New Jersey on five separate counts and there were imposed upon him five consecutive sentences, four of which were for a minimum of three years and a maximum of five, and the fifth with a minimum of two years and a maximum of three years, all convictions relating to breaking and entering and possession of burglar tools. Appellant has completed service of the maximum on the first four sentences, less credits allowed by law in reduction thereof, and is now serving the maximum of the fifth sentence.

He is a fourth offender in contemplation of the Parole Act of New Jersey, for, by his own admission, he has, on three or more prior occasions, been confined in institutions of state prison character in New Jersey or in other jurisdictions under circumstances described in Section 12(c), Chapter 84, P.L. 1948, Laws of New Jersey, the substance of which is as follows:

> "(c) Any person sentenced to any penal institution of this State who has previously served all or part of three terms of imprisonment in any penal institution
>
> (1) of this State, of the United States, or of any state other than this State, or
>
> (2) Of this State and the United States, or of this State, the United States and any other state, or of this State and any other state or states, or
>
> (3) Of the United States and any other state or states, or of more than one state other than this State,

shall be deemed to be a fourth offender and upon his incarceration for such fourth or later offense shall be ineligible for parole consideration by the board until he shall have served the maximum sentence imposed upon him for such fourth or later offense less any time earned for diligent performance of work assignments; subject, however, to the provisions of section thirteen of this act.

As used in this section 'penal institution' means and includes the New Jersey State Prison and any other State penal or correctional institution in this State to which offenders are sentenced for fixed terms or fixed minimum and maximum terms and other institutions of like character under the jurisdiction of the United States or of a state or states other than this State."

Appellant has been denied consideration for release on parole by the appellee for he clearly comes within the category of recidivists defined in the aforesaid section.

Appellant complains that he has been denied the protection afforded by the 14th Amendment to the United States Constitution and asserts that other fourth offenders, *i.e.*, those serving sentences of life and those serving sentences in county penitentiaries, are not subject to the provisions and limitations of Section 12(c), Chapter 84, P.L. 1948.

Section 11, Chapter 84, P.L. 1948, contains the following:

"Any prisoner serving a sentence of life shall be eligible for consideration for release on parole after having served 25 years of his sentence, less commutation time for good behavior and time credits earned and allowed by reason of diligent application to work assignments."

Section 35, Chapter 84, P.L. 1948, relating to prisoners in confinement in county penitentiaries, reads as follows:

"Notwithstanding any of the provisions of this act, any prisoner in a county penitentiary serving a term having a maximum greater than a year and who has

served at least one year of such term shall be permitted to make application to the board for parole * * *."

II. The Question Presented

The question presented by this appeal is:

Is the appellant, a fourth offender serving a series of consecutive sentences, each having a specified minimum and maximum number of calendar years, in the same "Class of persons" as a fourth offender serving a sentence of life without a definitely ascertainable minimum or maximum, or a fourth offender serving a sentence in a county penitentiary wherein prisoners convicted of minor offenses are confined?

III. No Substantial Federal Question Is Presented by the Attempted Appeal

Parole is no part of the sentence imposed by the criminal court. It is a privilege extended the prisoner in the discretion of the Parole Board and partakes of clemency or grace. It is a matter for regulation by the individual states. In *Ughbanks v. Armstrong*, Mich. 1908, 28 S. Ct. 372, 208 U. S. 481, 52 L. Ed. 582, the United States Supreme Court had this to say:

> "If a State choose to grant this privilege to make application to the Governor for discharge upon parole in the case of one class of criminals and deny it to others, such, for instance, as those who have been twice convicted of a felony, it is a question of State policy exclusively for the State to decide, as is also the procedure to ascertain the fact, as well as the kind or amount of evidence upon which to base its determination. It is not bound to give the convict a hearing upon the question of prior convictions, and a failure to give it violates no provision of the Federal Constitution."

The Legislature of New Jersey in establishing the Parole Act has attempted to discourage recidivism by withholding

parole consideration to subsequent offenders until they shall have served a percentage portion of their maximum sentence. Second offenders must serve one-half thereof, third offenders three-quarters and, as demonstrated, fourth offenders are denied parole consideration (Section 12(a), (b) and (c), Chapter 84, P. L. 1948). Obviously, it is impossible to compute a percentage portion of the maximum of a life sentence for the maximum on such a sentence is the duration of the natural life of the individual. Because of the impossibility of calculating such percentage portion, the Legislature, desiring to provide some basis for the paroling of life sentence prisoners, decreed that it should be 25 years less credits for work performed and for good behavior. The maximum credits will yield a minimum on a life sentence of approximately 15 years. If such provision did not appear in Section 11, Chapter 84, P. L. 1948, there would be no basis upon which a life sentence prisoner could receive parole consideration and, accordingly, the mandate imposed upon the Legislature by the New Jersey Constitution, which directs that "A system for the granting of parole shall be provided by law" (Art. V, Sec. II, Par. 1 and 2), would not be met.

Accordingly, a fourth offender serving a life sentence and a fourth offender serving one or more sentences having a minimum and a maximum term of years, are not in the same "Class of persons". The "Class" commonly referred to as fourth offenders is subject to further subdivision to accommodate, in addition to the appellant's category, those persons serving life sentences and, additionally, those confined in county penitentiaries, who are also fourth offenders.

Appellant makes much of the fact that, whereas a fourth offender life sentence prisoner is eligible for parole consideration at 15 years, assuming maximum credits, appellant is required to serve approximately 23 years in con-

finement which represents the adjusted maximum on each of a series of five consecutive sentences. We feel this argument to be completely without merit for it is the sole and exclusive function of the Legislature to determine the punishment that shall be meted out for conviction of crime or a series of such convictions.

Had appellant been given a single sentence of three to five years or had the court imposed all five sentences to run concurrently, rather than consecutively, the argument advanced by the appellant would serve him not at all. He would have long since completed his maximum and would have been at liberty.

Appellant cannot urge that he is denied liberty by the application of the New Jersey Parole Law. There is no guarantee to him that he will be released if considered for parole for that decision rests in the sole discretion of the paroling authority, the appellee.

Appellant is obliged to place himself squarely within the 14th Amendment of the United States Constitution and is required to demonstrate that he is a member of a "Class of persons" that is denied the equal protection of some law which favors another individual of the same class over him. Appellant seeks to establish a "Class of persons" consisting of fourth offenders defined in Section 12(c), Chapter 84, P. L. 1948. He fails for the class is subject to further subdivision. If appellant could show that any fourth offenders serving a series of minimum-maximum sentences are given more favorable treatment under the Parole Law, then he would have met the burden of proof. He has not done so nor are the facts and the law capable of such demonstration.

A prisoner released on parole in New Jersey must remain under parole supervision until the expiration of the maximum of his sentence. A condition of his parole provides that if he is again convicted of crime that he shall be re-

quired, in addition to the most recently imposed sentence, to serve the balance remaining on the maximum of the sentence upon which he was paroled (Chap. 84, P. L. 1948, Sec. 24).

Parole is merely an extension of prison limits. It is not a termination of sentence. A life sentence prisoner on parole remains under the legal custody of the chief executive officer of the institution from which paroled until the expiration of maximum (Chap. 84, P. L. 1948, Sec. 15).

Such parole may be revoked for conviction of crime of a lesser nature and confinement under the life sentence is resumed. Such is not the case with the appellant for upon completion of the maximum on each of his consecutive sentences he is free to go where he chooses, is not required to report to a parole officer and may change his place of residence at any time, all of which privileges are denied the life sentence prisoner on parole. The appellant may marry or secure a driver's license without the consent of the paroling authority; not so with the life sentence parolee.

Appellant relies on *McPherson* v. *Blacker*, 146 U. S. 1, where this Court said:

> "The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or *class of persons* from being singled out as a special subject for discriminating or hostile legislation." (Emphasis supplied.)

We are satisfied that this represents a fair and accurate statement of the applicable law but are obliged to reject appellant's theory that he, as a fourth offender, is in the same "Class of persons" as a fourth offender serving life nor is he in the same "Class" with a fourth offender serving a sentence in a county penitentiary, which, under the law of New Jersey, cannot exceed 18 months (N. J. S. A.

2:192-3), and reference to which is made in Section 35, Chapter 84, P. L. 1948.

It is not the intention of the Legislature to remove county penitentiary prisoners from the operation of Section 12(c), Chapter 84, P. L. 1948, but rather to remove them from the limitation found in Section 17 of the Parole Law which provides that consideration for release on parole shall be solely upon the initiative of the appellant and "No application for parole made by a prisoner, or on his behalf, shall be considered by the board".

Because of the short duration of county penitentiary sentences and because the appellee is precluded from granting parole to any such prisoner prior to service of at least one year of his sentence (Sec. 35, *supra*), the Legislature deemed it advisable to place the burden upon the county penitentiary prisoner to apply for parole rather than require the appellee to examine hundreds of cases upon its own initiative, a very small percentage of which would result in parole action.

Appellant observes that he would have been considered more favorably by appellee had there been imposed upon him a life sentence as he alleges is mandatory under the Habitual Offender Law of New Jersey (R. S. 2:103-10). There is no such requirement, after indictment, trial and conviction as a fourth offender, that New Jersey courts impose a mandatory life sentence. The statute was construed in the matter of *In re Caruso*, 131 N. J. L. 505, where Mr. Justice Porter said:

> "This statute vests discretionary power in the trial court to impose life sentence on an habitual criminal, which is defined as any one convicted of a fourth high misdemeanor and where the accused has been sentenced on each of the first three counts to the State Prison and has served the sentences or a part thereof." (Aff. 135 N. J. L. 522, N. J. Supreme Court 1944.)

Statutory enactments will not be considered constitutionally invalid as special or class legislation merely because they affect one class and not another, provided that they affect all members of the same class alike. (*Youngquist* v. *City of Chicago*, 1950, 90 N. E. 2d 205, 405 Ill. 21.) In *Ballantine* v. *Nester*, 1942, 164 S. W. 2d 378, 350 Mo. 58, it was determined that for a statutory classification to become obnoxious to the 14th Amendment, United States Constitution, the selection must not be merely possibly, but clearly and actually, arbitrary and unreasonable.

The statutory scheme of parole legislation in New Jersey, requiring recidivists to remain longer in confinement without parole consideration, does not permit of the treatment of fourth offender life sentence prisoners in the same class as fourth offenders serving minimum-maximum sentences. Thus, the Legislature in order not to deny parole consideration to such a life sentence prisoner, irrespective of habitual offender status, has decreed that they shall constitute a class and each shall serve 25 years in confinement less time credits in reduction thereof for good behavior and work performed. The distinction is reasonable, under the circumstances necessary, and in no sense arbitrary or discriminatory as proposed by the appellant.

IV. The Authorities Relied upon by the Appellant Do Not Serve Him But Support the Position of the Appellee

Reference is made to McPherson v. Blacker, supra, relied upon by the appellant. Appellant apparently inadvertently omitted the next succeeding paragraph of the opinion of the court at page 12 in 13 Sup. Ct. Rep., which is of considerable interest and which reads as follows:

> "In Hayes v. Missouri, 120 U.S. 68, 71, 7 Sup. Ct. Rep. 350, Mr. Justice Field, speaking for the court, said 'The Fourteenth Amendment to the Constitution

> of the U. S. does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, *under like circumstances and conditions*, both in the privileges and in the liabilities imposed. * * * Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons *similarly situated*, is not within the amendment. 113 U.S. 27, 32, 5 Sup. Ct. Rep. 357'." (Emphasis supplied.)

We believe that appellant is not "similarly situated" with fourth offender life sentence prisoners and further that he is treated exactly as every fourth offender minimum-maximum sentence prisoners "under like circumstances and conditions".

Appellant relies on *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369, and it is unfortunate that he did not set out at length from the opinion of the court at page 377, 55 L. Ed. relating to the contention that certain legislation establishes arbitrary classifications and consequently denies the equal protection of the laws to those whom it affects. Therein Mr. Justice Van Devanter said:

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these:
>
> 1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that

regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary.

2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality.

3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Appellant fails to carry the burden imposed upon him by these rules viewed in the light of the conditions which required the New Jersey Legislature to exercise validly its police power.

Appellant relies on *McLean* v. *Arkansas*, 211 U.S. 539, 29 S. Ct. 206. The court made this observation at page 319, 53 L. Ed.:

"While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as is the right of judicial interference itself.

The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power."

In *Louisville and Nashville RR* v. *Stockyards Co.*, 212 U.S. 133, 144, 29, S. Ct. 246, it was said:

> "The law itself must save the party's rights and not leave them to the discretion of the courts as such."

We fail to observe how this legal principle, accurate as we concede it to be, applies to the appellant, for certainly none of his rights have been adversely affected by the exercise of discretion of the New Jersey courts for, as a fourth offender serving minimum-maximum sentences, he was denied the privilege of parole in clear, unmistaken and unambiguous language, all of which was fortified by his own admission that he was so convicted on prior occasions as to bring him within the category of a fourth offender in contemplation of the New Jersey Parole Act.

Lanzetta v. *State of New Jersey*, 306 U.S. 451; 59 Sup. Ct. 618, has no application to these proceedings for it was grounded solely on lack of due process because the statute was ambiguous and failed to give proper notice to a defendant of the basic elements of the crime with which he was charged. Since the appellant does not advance in his statement of jurisdiction any argument pertaining to denial of due process, we must assume that he restricts his presentation of the issues here to the sole question of denial of equal protection of the laws, an element completely lacking in the Lanzetta decision.

Zucht v. *King*, 260 U.S. 174; 43 Sup. Ct. 24, is authority for the proposition that it is within the police power of a state to require compulsory vaccination of children attending public and private schools, and, further, that the United States Supreme Court will not intervene in a situation where, although the constitutionality of a state law is drawn in question, no substantial constitutional question is presented, as we aver is the circumstance in this attempted appeal.

Yick Wo v. *Hopkins*, 118 U.S. 356; 6 Sup. Ct. 1064, makes no reference to denial of equal protection of the laws but confines itself to denial of due process and decides that a municipal ordinance which denies due process will be declared invalid by the United States Supreme Court. There can be no quarrel with this proposal, but the facts are so entirely dissimilar as to render the case inapplicable to the matter sub judice.

V. Appellant Does Not Confine Himself to the Record Below

At page 10 in the appellant's statement, he endeavors to persuade this honorable Court that the recent prison disorders in the State of New Jersey, as well as those in other states of the Union, can be attributed directly to inadequate or discriminatory parole systems. The statement is purely conjectural and barren of factual basis in this or any record for the committee appointed by the Governor of New Jersey to study the prison problem has made no report. We respectfully submit that this appeal must be decided on its merits in the light of applicable decisions and the facts adduced herein, rather than upon sheer speculation.

VI. The Opinion Below

The opinion of the Supreme Court of New Jersey is set out at length as Appendix "A" of appellant's statement. Further elaboration thereon would serve no useful purpose, save to comment that we believe that the decision is manifestly correct, gives consideration to all constitutional rights of appellant and determines properly that the New Jersey Parole Law is in no sense repugnant to the 14th Amendment to the United States Constitution. The law establishes no classifications which may be said to be arbitrary, discriminatory or unreasonable but merely recog-

nizes and treats impartially with subdivisions in the general category of fourth offender prisoners, favoring none over the other.

Conclusion

We respectfully submit that the appellant has failed to carry the burden of proof imposed upon him by the decisions in that he cannot demonstrate that his classification as a fourth offender minimum-maximum sentence prisoner does not rest upon reasonable basis; and, we further submit that no substantial question is presented by this appeal which entitles appellant to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE, appellee respectfully moves that the within appeal be dismissed or that the judgment and decree of the Supreme Court of the State of New Jersey be affirmed.

THEODORE D. PARSONS,
Attorney General of New Jersey,
Counsel for Appellee.

EUGENE T. URBANIAK,
Deputy Attorney General,
Of Counsel.

APPENDIX "A"

Statutes Involved

The statute under consideration is Chapter 84 of the Laws of New Jersey of the 1948 Session and specifically Sections 11, 12(a), (b) and (c), 15, 17, 24 and 35.

Those pertinent sections not recited at length in the main statement are set forth herein:

Section 12(a) and 12(b), Chapter 84, P.L. 1948.

The granting of parole, as provided for herein, shall be limited as follows:

(a) Any offender sentenced to any penal institution of this State who has previously served all or part of a term of imprisonment in any penal institution

(1) Of this State, or
(2) Of the United States, or
(3) Of any state other than this State,

shall be deemed to be a second offender and upon his incarceration for such second offense shall be ineligible for parole consideration by the board until he shall have served at least one-half of the maximum sentence imposed upon him for such offense less any time earned for diligent performance of work assignments; subject, however, to the provisions of section thirteen of this act.

(b) Any person sentenced to any penal institution of this State who has previously served all or part of two terms of imprisonment in any penal institution

(1) Of this State, of the United States or of any state other than this State, or

(2) Of this State and of the United States, or of this State and of any other state, or of the United States and any other state, or of any states other than this State,

shall be deemed to be a third offender and upon his incarceration for such third offense shall be ineligible for parole consideration by the board until he shall have served at least three-fourths of the maximum sentence imposed upon him for such third offense less any time earned for diligent performance of work assignments; subject, however, to the provisions of section thirteen of this act.

Section 15, Chapter 84, P.L. 1948.

If the board shall determine that a prisoner is eligible for parole then he may be released, upon such terms and conditions as the board shall prescribe, but while on parole shall at all times remain in the legal custody of the warden, keeper or chief executive officer of the institution from which he is paroled, and under immediate supervision of the Division of Parole of the Department of Institutions and Agencies in accordance with the rules of the board, until the expiration of the maximum sentence prescribed by law for the crime for which he was committed.

Section 17, Chapter 84, P.L. 1948.

The release of a prisoner on parole shall be solely upon the initiative of the board and no application for parole made by a prisoner, or on his behalf, shall be considered by the board. The warden, keeper or chief executive officer of any penal or correctional institution referred to in this act shall permit all prisoners to forward uncensored mail to the board. It shall be the duty of the board to maintain a record of the dates upon which each prisoner shall first be eligible for parole consideration as provided in section nine hereof. On or before such date, in the case of each prisoner, it shall further be the duty of the board to consider the case of each such prisoner for parole and to cause to be brought before it all information regarding the prisoners referred to herein. Prior to considering any such case, the board shall give public notice of the name of the prisoner, and the county from which and crime for which, he was committed. The Division of Parole shall furnish the board with a report and

evaluation of the factors relating to the community parole plan required herein.

Section 24, Chapter 84, P.L. 1948.

A prisoner, whose parole has been revoked because of conviction of a crime committed while on parole, shall be required, unless sooner reparoled by the board, to serve the balance of time due on his sentence to be computed from the date of his original release on parole. If parole is revoked for reasons other than subsequent conviction for crime while on parole then the parolee, unless sooner reparoled by the board, shall be required to serve the balance of time due on his sentence to be computed as of the date that he was declared delinquent on parole.

Additional Applicable Statutes Referred to in Statement

R.S. 2:192-3.

Every person sentenced under the laws of this State to imprisonment for any time less than one year shall be confined in the common jail of the county where conviction was had, or the county workhouse or penitentiary, in the discretion of the court, and there safely kept until the term of his confinement shall expire and the fine and costs of prosecution be paid, or until he shall be discharged by due process of law; provided, in counties of the first class no sentence exceeding six months shall be made to the common jail of the county. Every person so sentenced to the county workhouse or penitentiary shall be transferred to and confined therein within ten days after the sentence.

Every person sentenced to hard labor or imprisonment, except as hereinafter provided, for any term of one year or longer shall be imprisoned in the State Prison; except that in any county in which a penitentiary is located, a person sentenced to hard labor and imprisonment for a term of not less than one year and not exceeding eighteen months, shall be imprisoned in the penitentiary of such county instead of the State Prison, unless the person so convicted shall have previously served a term in the State prison, in which case the person so convicted may, in the discretion of the court,

be imprisoned in the State Prison; provided, nothing herein contained shall be construed to prevent the sentence of persons to penitentiaries in counties of the first class to terms of between six months and one year.

In any county in which a workhouse is located, any person sentenced to hard labor and imprisonment for a term of not less than one year and not exceeding eighteen months, may, in the discretion of the court so sentencing, be imprisoned in such county workhouse instead of the State Prison or county penitentiary.

R.S. 2:103-10.

Any person who on three separate occasions has been convicted of high misdemeanors in this State, or of crimes under the laws of the United States or of any other state or country, which crimes would be high misdemeanors if committed in this State, or whose convictions for such offenses in this State or under the laws of the United States or of any other state or country shall total three or more, and who shall thereafter be convicted of a subsequent offense enumerated in this subtitle, is hereby declared to be an habitual criminal, and the court in which such fourth or subsequent conviction is had, shall impose a life sentence in the State Prison upon the person so convicted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 387

GRAFTON MAHONEY,

Appellant,

vs.

THE PAROLE BOARD OF THE STATE OF NEW JERSEY

REPLY TO STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

In Respondent's Statement opposing jurisdiction, the State concedes that fourth offenders serving life sentences under Section 11 and fourth offenders committed to County penitentiaries under Section 35 receive parole consideration while fourth offenders sentenced to the State Prison under Section 12(c) receive none. To justify such discrimination, Respondent argues (p. 4):

> "The Legislature of New Jersey, in attempting to establish the Parole Act, has attempted to discourage recidivism by withholding parole consideration to subsequent offenders . . . and under Section 12(c) . . . the Legislature of New Jersey created the

classes and prescribed the parole rights as to first, second, third and fourth offenders."

For the same purpose, Respondent argues (p. 5):

> "If such provision did not appear in Section 11 . . . there would be no basis upon which a life sentence prisoner *could receive parole consideration* and, accordingly, the mandate imposed upon the Legislature *by the New Jersey Constitution*, which directs that 'A system for the granting of parole shall be provided by law' . . . *would not be met.*" (Italics supplied.)

If the constitutional mandate to the Legislature was to create "a system for the granting of parole" and would have failed to meet this duty by denying fourth offenders serving life sentences parole consideration, then to an even greater degree the Legislature has failed to fulfill the mandate by denying such consideration to fourth offenders who are committed to the State Prison serving sentences of less than life.

The operation of this statute as applied under Respondent's admission would enable a fourth offender serving life to be paroled at the expiration of 15 years, whereas Petitioner is bound to serve the maximum of his consecutive sentences of 23 years.

There is no real or substantial distinction between fourth offenders serving life sentences under Section 11 and fourth offenders serving sentences less than life under Section 12(c). Their status is the same. Both are fourth offenders. Both are committed to the State Prison. The only possible difference is that of length of servitude. Despite the avowed legislative objective to give less parole consideration to the more offending recidivist, this law as applied favors the greater offender with parole consideration and gives the lesser offender none.

To justify the patent discrimination between fourth offenders serving terms in the County penitentiaries who received parole consideration under the statute and those serving terms in the State Prison who received none, Respondent argues (p. 8):

> "It is not the intention of the Legislature to remove County penitentiary prisoners from the operation of Section 12, paragraph c . . . but rather to remove them from the limitation found in Section 17 of the Parole Law which provides that consideration for release on parole shall be solely upon the initiative of the Appellant and 'no application for parole made by a prisoner or on his behalf shall be considered by the Board'."

This statement is erroneous because Section 35 provides, inter alia:

> "Notwithstanding *any* of the provisions of this Act, *any* prisoner in a County penitentiary . . . shall be permitted to make application to the Board for parole." (Italics supplied.)

and it is obvious that all of the provisions of the statute are excluded, including Section 12.

This argument falls for another reason. If Petitioner had been committed to a County penitentiary under sentence of 18 months or less, he would have been entitled to parole consideration under Section 35 *despite his status as a fourth offender.*

Under Chapter 153, P. L. 1945 (New Jersey Statutes Annotated, Title 2:192-3), the type of crime is not a relevant factor, but it is the sentence of the Court which is determinative of the place of incarceration. (The statute in question is quoted in extenso at page 8 of Petitioner's Statement as to Jurisdiction.)

Finally, Respondent argues (p. 9) that a valid and reasonable "distinction" exists between fourth offenders serving life sentences and fourth offenders committed to the County penitentiaries who received parole consideration and fourth offenders committed to State Prisons who received none. This argument is without merit. Respondent concedes that it was the legislative purpose to establish classes of recidivists to receive graded parole consideration. The classes were second offenders, third offenders and fourth offenders. There is no legislative requirement either as to the type of prior crime (such as felony or misdemeanor) or the term of sentence and, therefore, the artificial distinctions claimed by Respondent to exist in the cases of fourth offenders serving life in the State Prison under Section 11 and fourth offenders committed to County penitentiaries under Section 35 are superficial and bear no just and proper relation to the policy of the law.

There is not a single word in this entire statute which expressly authorizes parole consideration to fourth offenders serving life or fourth offenders who are committed to County penitentiaries. Yet Respondent frankly admits that parole consideration is granted to them under Sections 11 and 35. Under these circumstances, this statute as applied by the State authorities is clearly discriminatory and prejudicial to Petitioner. All are fourth offenders, but those under Sections 11 and 35 are favored with the *right* of parole consideration, whereas Petitioner, under Section 12(c), is denied the right to apply for parole and is compelled to serve the full maximum of his sentences.

Such legislation where patent discrimination exists on the face of the law and as applied by the State authorities contravenes the equal protection of the laws guarantee under the Fourteenth Amendment. This statute permits the State authorities to act arbitrarily and to discriminate

against members of the same class (fourth offenders), favoring those serving life or those committed to County penitentiaries and adversely treating those such as Petitioner against whom Section 12(c) is invoked.

Such legislation has been repeatedly condemned by this Court in the cases cited in the Statement as to Jurisdiction, to which may be added:

U. S. v. *Heinze,* 218 U. S. 532, 31 Superior Ct. 98, 54 L. Ed. 1139;

Howard v. *Kentucky,* 200 U. S. 164, 26 S. Ct. 189, 50 L. Ed. 421;

Smith v. *Board of Examiners,* 85 N. J. L. 46.

Conclusion

The questions here presented are substantial and in the public interest and should be reviewed and decided by this Court for the reasons stated in the Statement as to Jurisdiction and in this Reply. Respondent's Motion to Affirm is without merit and should be dismissed, and in the event that this Honorable Court should decline to review and decide the case after hearing and argument, it is requested that the judgment below be reversed for the reasons stated in the dissenting Opinion of Justice Heher.

Respectfully submitted,

SAMUEL KAGLE,
IVAN C. BASH,
Attorneys for Petitioner.

No. 387. MAHONEY *v.* PAROLE BOARD OF NEW JERSEY. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The motion to dismiss is granted and the appeal

is dismissed for the want of a substantial federal question. *Samuel Kagle* for appellant. *Theodore D. Parsons*, Attorney General of New Jersey, and *Eugene T. Urbaniak*, Deputy Attorney General, for appellee. Reported below: 10 N. J. 269, 90 A. 2d 8.